PUBLIC PROSECUTOR

v.

KOH CHEE MENG

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL TRIAL NO. 2 OF 1987]
29 AUGUST 1990

CRIMINAL PROCEDURE: *Trafficking - Ambush - Identification - Drugs allegedly recovered from plastic bottle - Prosecution witness not answering questions in forthright manner - Primary facts not inherently incredible - Corroboration - Re-evaluation of the prosecution evidence - Presumptions - Dangerous Drugs Act 1952, s. 37(d)*

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

The police officer who arrested the accused testified that at the briefing prior to the ambush the raiding party had been told to keep a look out for a person wearing a red shirt. This fact was of great importance in the trial as the defence called one L (DW6) who also stated that he was wearing a red shirt on the night of the arrest in the standby of the place of ambush. The accused in his evidence on oath testified that he was wearing a green shirt and not a red shirt. L was called by the defence to corroborate the testimony of the accused.

The testimony of L implied that the testimony of the police officers who formed the raiding party had been fabricated and or refurbished in order to attach criminal liability against the accused. The Court in considering the 2 different versions had to re-evaluate the prosecution evidence in the light of the totality of the evidence.

Held:

[1] The omission by PW4 to testify that the raiding party were told that the person in red was the actual target while on the other hand PW5 stated that he instructed his men specifically to observe a male Chinese wearing a red shirt, cast a blemish on the prosecution.

[2] There were material contradictions in the prosecution evidence; there was clearly some confusion in PW3's perception of the location of the ambush and a subsequent arrest.

[3] The evidence as regards the sketch plan of the restaurant and the subsequent visit to the site lent evidence to the defence suggestion that the route that must have been taken by PW3 and PW4 was the one around "I" and not the route marked by PW3.

[4] The Court was left in a real state of doubt as to the truth of the prosecution case and as a result the Court did not have to consider the effect of the rebuttable presumptions under ss. 37(d) and 37(da)(i) of the Act.

[Accused acquitted and discharged.]

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)

For the public prosecutor - Hadariah Syed Ismail, DPP
For the accused - Teh Poh Teik; M/s. Abdul Raman Saad & Asso.

JUDGMENT

LC Vohrah J:

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 in that he on 26 July 1985 at about 10.30 p.m. at shop No. 1, Jalan Badik 1, Taman Sri Tebrau, Johor Bahru did traffic in heroin weighing 36.309 grams.

As adduced by the prosecution, the relevant facts were as follows. On 26 July 1985 as a result of information received Inspector Philip Yeow (PW5) summoned 6 constables to his office at about 9.45 p.m. and briefed them about an ambush they were to conduct that night. They all then proceeded to a restaurant at No. 1, Jalan Badik 1 in Taman Sri Tebrau, Johor Bahru. They arrived there at about 10.30 p.m. and then took up pre-determined positions around the restaurant. Constable Abdul Rahim bin Nizamudin (PW3) and Constable Mohd. Radzuan bin Shuib (PW4) stationed themselves at the rear end of the restaurant from where they could watch clearly what was happening in the back portion of the restaurant comprising the kitchen and a store-area as that portion was well lighted. After watching for a few minutes they observed the accused, who was wearing a red shirt, handing something which he removed from a large white plastic bottle (P2) which he was holding in one hand to another person who was wearing a white shirt. On seeing this PW3 contacted PW5, who had taken up a position at some other point, by means of a walkie-talkie and was directed to arrest the accused. PW3 and PW4 then went up to the accused and arrested him. PW4 placed the handcuffs upon the accused whilst PW3 took possession of P2 which, he discovered, had been slit at the bottom. Through this slit PW3 recovered from inside the bottle 5 packets (P6A-E) made up of Chinese comics inside each of which he found 10 small plastic packets suspected to contain drugs. Alongside these 5 packets PW3 also found two more small plastic packets (P12F1-F2), suspected also to contain drugs, and a loose Chinese comic (P6F). The contents of these 52 plastic packets were later sent to the Government Chemist (PW1) for analysis and he found the total weight of heroin in them to be 36.309 grams.

The main evidence relating to the observation kept upon the scene and the transaction that took place at the scene between the accused and the person in the white shirt was given by PW3 and PW4. PW3 said that he was about 40 feet away from the accused at the back of the restaurant on the outside to the right of its extended area as shown in the sketch-plan P16 when he saw what happened and reported to PW5 by walkie-talkie. He was then told by PW5 to effect arrest and he together with PW4 walked along the fenced area as indicated in P16 and then went up to the extended area and arrested the accused at the scene where he found P2 resting on a wooden box represented by 'D' in P16. He took possession of P2 and on opening the bottom found the drug exhibits. After PW5 had come up to them and been told of the accused's arrest by him they conducted a search of the immediate area after which he brought the accused and the exhibits straight back to the police station and lodged a report. The accused was wearing a red shirt when he was arrested. PW4 testified that at the briefing by PW5 they had been told about a person wearing a red shirt. They had also been told to keep watch over a restaurant and the people in it. He was the actual person who had handcuffed the accused upon his arrest and after handing over the accused to PW3 he left the scene directly for the police station.

PW5's evidence disclosed that he had received information on the night in question concerning a person wearing a red shirt pushing drugs at the restaurant and he and his men arrived at the scene 45 minutes afterwards at 10.30 p.m. After the arrest of the accused and the taking into possession of the exhibits by PW3 he brought the proprietress of the restaurant and one of her employees to the police station in his car. He himself did not surrender the accused to the officer in charge of the police station (PW6).

The evidence of PW3, PW6, the investigating officer of the case (PW7), and PW1 showed that there was no break in the chain of evidence relating to the identity of the drug exhibits from the moment of their recovery by the police until their production in Court, all properly sealed. PW4 did not answer the simple questions which were put to him in the forthright manner expected of a police officer of 10 years' experience and appeared to be too concerned about whether he was giving the right answer or not apart from taking a long time in answering questions. Although I did not consider him to be a reliable witness, I was of the view that there were primary facts, not inherently incredible which showed on a prima *facie* basis, that the accused at the time, date and place stated in the charge was in possession of 36.309 grams of heroin, a dangerous drug within the meaning of s. 2 of the Act. I accordingly called on him to make his defence.

The accused elected to give evidence on oath. His testimony as to how he came to be arrested differed materially from that of the prosecution and can be summarised as follows. On the day of his arrest he was 23 years of age and was working as a cook in a restaurant in Singapore. As he was enjoying a week's holiday he decided to travel to Johore Bahru in order to get his passport endorsed by the Malaysian Customs and to visit his friend Lam Hock Sang, nicknamed Chow Chai and also Sow Fook, whom he had known for 10 years as both he and Lam hailed from Kuala Kangsar. He arrived in Johore Bahru at 3 p.m. in a taxi with a bag containing things for his overnight stay - 3 shirts, 2 pairs of trousers, a towel, a tooth-brush and hair-cream. His bag was checked and cleared by Malaysian Customs and the taxi dropped him at the Johore Bahru taxi stand where he took another taxi to a hairdressing saloon in Taman Sri Tebrau opposite the restaurant in question. The saloon which was situated on a top floor was owned by a lady called Wendy who was a close friend of Lam. As Lam was not around he took a nap in the saloon until about 6 p.m. when Lam arrived. They chatted until 8 p.m. and then proceeded to the restaurant which he had been to a couple of times before and ordered coffee and Teochew porridge. The restaurant was crowded at the time but they found a table within the restaurant proper. They chatted for half an hour and then Lam left the table to go to the toilet. When Lam returned Lam told him that he would be leaving for a while without revealing his destination. After finishing his meal he too went to the toilet and then returned to the table. Later a male Chinese approached him and enquired where Lam was and he replied that Lam had left. This individual, whom he had met a couple of times before at the saloon, then left the restaurant. Soon afterwards four male Malays approached him, two from the front entrance of the restaurant and the other two from the side entrance. One of them was PW3 who tapped him on his shoulder, produced his police authority card and asked him for his identity card. He gave it to PW3 who then asked him if he had finished eating. Upon his replying in the affirmative and paying for his meal one of the four policemen clutched the scruff of his collar and led him to a lane nearby at the top of Jalan Keris Satu where he saw the Chinese individual he had met earlier in the company of two other male Malays. This individual then pointed at him and one of the police officers asked him, "Pek Hoon mana? Pek Hoon mana?". He replied he did not know. The police officers then searched his person and took possession of the cash he was carrying amounting to RM70 and S$200 and handcuffed him. After this they took him back to the restaurant to a proper store-room where he remained for 20 minutes during which time the store-room was searched and he was assaulted. Of the six policemen who proceeded to the store-room with him, two at one point left the store-room for about 10 minutes and he heard one of them subsequently say, "Sudah dapat, sudah dapat" when they returned with a bottle. He then saw PW3 talking over a walkie-talkie and heard him utter the words: "Nanti saya bawa anjing mari". Then he was led from the store-room to the cooking area, as depicted in P15B, where he saw a bare-bodied Chinese squatting on the

floor with his hands secured by handcuffs. Whilst in this area the six policemen carried out a search and PW5 appeared. He heard PW5 ask: "Pui Kia mana, Pui Kia mana?". PW5 then placed a second pair of handcuffs on his hands without asking him any questions although he asked PW3 where P2 had been recovered from. PW5 and his men then brought him from the kitchen area to the saloon across the road after ascertaining that he resided in Singapore. At the saloon PW5 took possession of his bag and also his passport which was in the bag. From there he was brought to the police station in PW5's car together with the female restaurant owner and the handcuffed bare-bodied male Chinese. At the police station these two persons alighted and he was brought to the Customs Check Point near the causeway. Why? He did not know. Then he was brought back to the police station and put in the lock-up after he had been stripped down to only his underpants. Whilst at the police station he saw finger prints being taken of the lady and the bare-bodied male Chinese. At the time of his arrest he was wearing a green shirt and not the red shirt P4 which was inside his bag. He only wore the red shirt the next day when he was produced in Court and later taken to the hospital because his green shirt was dirty. He was not a drug addict and prior to his arrest at the restaurant he had never seen P2 or concealed the 52 packets therein or worked in the restaurant.

Through the younger sister of the accused (DW4) and his elder brother (DW5) the defence established that prior to the night of his arrest the accused actually lived in Singapore where he worked as a cook. Through the present owner of the hair-dressing saloon opposite the restaurant (DW3), who was not known to the accused, it was established additionally for the defence that the saloon did actually have a separate make-up room where the accused testified he had slept whilst waiting for Lam Hock Sang (DW6). The defence then attempted to corroborate the accused's evidence relating to the events prior to his arrest on the night in question through the testimony of DW2 who was produced from Kajang prison where he was being detained for an offence under the Firearms Act.

DW6 in examination-in-chief testified as follows. He did meet the accused at the saloon some time around 7 or 8 o'clock that night but not by prior appointment. The accused was asleep when he arrived. After they had a chat they proceeded to the restaurant to have porridge. They sat at a corner in the restaurant proper at the point C in the sketch plan P16 and whilst partaking of his porridge he left for the toilet upon seeing a person arrive with drugs for him. On leaving the toilet he went to check and found P2 lying on the floor with other bottles. He then returned to his table and informed the accused that he was leaving to meet a friend. He then went up to the saloon, had a bath and returned to the extended area of the restaurant in order to collect the drugs. On the way back to the restaurant he saw a Chinese person holding a walkie-talkie. At the restaurant he ordered a bottle of Coca-cola and then discovered that an unusual situation had developed whereupon he returned to the saloon to collect his clothes. Whilst there he heard noises at the collapsible gate downstairs. He then went to the back of the saloon and fled by jumping down on to an awning. He was himself wearing a red shirt that night. The accused had no knowledge of the drugs.

In cross-examination, DW6 stated as follows. He had known the then proprietress of the saloon for quite a while and had himself stayed in the saloon when he used to sleep in an area where customers used to wash their faces. His intention that night was to remove P2 from behind the wooden screen, as shown in P15B, when the restaurant was shut so as to avoid being seen. The drugs in P2, whose bottom had been slit by him, had a market value of RM5,000 to RM6,000. He had not as yet made payment for the drugs to his supplier who was his "boss". On his return to the restaurant from the saloon after his bath, which had lasted 15 to 20 minutes, the accused was not around. At that point of time he had been

dealing in drugs for about 3 months. He felt that it was quite safe for him to leave the drugs at the back portion of the restaurant because it was the area of the kitchen which was dirty and unoccupied.

DW6 also stated during cross-examination that the accused like him was wearing a red shirt that night and when I told him that the accused had testified to wearing a green shirt he replied he could not remember what the colour of the accused's shirt was. Despite this apparent prevarication on the part of DW6, I did not think I was entitled to treat him as a witness wholly unworthy of credit.

Considering the whole of the evidence presented by the defence, I was of the view that there was nothing to suggest that what DW6 said about the meeting with the accused at the saloon, their dining together inside the restaurant and his leaving to check the delivery of the drugs was not inherently true. In the light of this evidence I considered that the accused's story could not be discounted although acceptance of it would have implied the suggestion by the defence that the evidence of the prosecution particularly that given by PW3, PW4 and PW5 had been fabricated and/or refurbished in order to attach criminal liability against the accused. Considering the two different versions presented on oath, one by the prosecution and the other by defence, I had to re-evaluate the prosecution evidence in the light of the totality of the evidence. The main evidence against the accused which brought into operation the presumptions under s. 37(d) and s. 37(da)(i) of the Act was that of PW3 and PW4 who had testified that they saw the accused, who was wearing a red shirt, holding P2 (which contained the drugs) in one hand, and passing something from the plastic bottle to a man wearing the white shirt. PW3 was quite certain when he was cross-examined that PW5 did not give any particulars or description of the person the police party were supposed to ambush that night. He said:

> Before we left for the scene Inspector Philip did not give me or the other officers any particulars or description of the target. When we left the police station for the scene we did not know whom to look for.

PW4, who was a very slow and far from forthright witness (as I adverted to earlier) stated, however, that he was certain that PW5 in his briefing had mentioned a person wearing a red shirt when they were asked to keep observation of the restaurant but he did not say that they were told that the person in red was the actual target for that night's ambush; PW5 on the other hand stated that he had instructed his men specifically to observe a male Chinese wearing a red shirt. The fact that the target was a person wearing a red shirt was, I agreed with Counsel for the defence, a very important detail which should and would have come out naturally in the evidence of PW3 (who had taken a dominant role leading to the accused's arrest) if that fact had actually been stressed by PW5. If this description had actually been given by PW5 in his briefing it would have formed the most important fact relating to that night's ambush and a fact which should have been remembered clearly by PW3 and PW4 when giving their evidence. The police report made by PW3 was also not furnished to corroborate the fact that the arrest was made of the accused upon observation of the targeted figure, i.e. a person wearing a red shirt. In my view this omission cast a blemish on the prosecution case.

I also found material contradictions in the prosecution evidence when I considered the evidence of PW3 who, in cross-examination, was quite certain that the accused was handcuffed in a lane behind the restaurant but was not quite sure if a second pair of handcuffs had in fact been applied on the accused by PW5. Applying a second set of handcuffs on

an arrested person who was already handcuffed would have been most unusual and any suggestion to him to that effect should have been rejected outright by PW3 unless in fact it was done as stated by the accused.

There appeared to be also some corroboration of the accused's evidence that he was brought to a proper store-room within the normal confines of the restaurant when a search was conducted of that store-room in his presence before the discovery of P2. This was clear from PW3's evidence in cross-examination. In his evidence in re-examination he spoke of the area represented by D, E and F as a store but in cross-examination he talked clearly of a store-room. If he had meant the store or store-area to be the store-room that certainly was not clear from his evidence. There appeared to be clearly some confusion in his perception of things and the existence of a proper-room separate from what could be called a store area at D, E and F of P16 contiguous to the kitchen was a distinct possibility in the light of the accused's evidence to the effect that he had been taken to a store-room from the lane following which he was assaulted and a search was conducted by the police of the store-room proper.

There was also one other aspect of the case I was uneasy about. When we visited the scene on the application of Counsel for the defence in order to be able to read the sketch-plan P16 more clearly I noticed that the wall of the small building "I" housing the shrine was so close to the fence at the back of the restaurant as to make it impossible for anyone to walk through the space in between if one followed the route marked out by PW3 which, he stated, he and PW4 took when they arrested the accused 10 minutes after observing him pass something to the person in the white shirt. If indeed there was a space of a meter or more, as testified by the investigating officer PW7 at the time of the ambush, no evidence was established by the prosecution to indicate that the present building which we saw is an enlarged version of the building "I" which existed on the night in question. The visit to the site lent credence to the defence suggestion that the route that must have been taken by PW3 and PW4 was the one around "I", as indicated in pencil on P16, thus adding another blemish to the prosecution case. These were some of the major unsatisfactory features in the prosecution evidence and I was left in a real state of doubt as to the truth of the prosecution case. In the event I did not have to consider the effect of the rebuttable presumptions under s. 37(d) and s. 37(da)(i) of the Act. The accused was accordingly acquitted and discharged.

Also found at [1991] 1 CLJ 571